IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs September 9, 2009

STATE OF TENNESSEE v. RONNIE LEE JOHNSON

Direct Appeal from the Criminal Court for Putnam County
No. 07-0589 David Patterson, Judge

No. M2008-02848-CCA-R3-CD - Filed February 18, 2010

A Putnam County jury found the defendant, Ronnie Lee Johnson, guilty of possession with intent to sell or deliver over 0.5 grams of cocaine, a Class B felony, and simple possession of dihydrocodeinone, a Class A misdemeanor. The trial court sentenced the defendant as a multiple offender to seventeen years in the Tennessee Department of Correction for the first count, to be served consecutively to eleven months, twenty-nine days for the second count. On appeal, the defendant contends that (1) the evidence was insufficient to support his convictions, (2) the trial court erred by refusing to order the state to disclose a confidential informant, (3) the warrantless search of defendant's house violated his constitutional rights, and (4) he received ineffective assistance of counsel. Following our review, we affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed

J.C. MCLIN, J., delivered the opinion of the court, in which JERRY L. SMITH and NORMA MCGEE OGLE, JJ., joined.

John Wayne Allen (on appeal and at trial), E. J. Mackie, Assistant Public Defender (at trial), for the appellant, Ronnie Lee Johnson.

Robert E. Cooper, Jr., Attorney General and Reporter; Matthew Bryant Haskell, Assistant Attorney General; Anthony J. Craighead, Interim District Attorney General; and Beth E. Willis, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Background

The Putnam County Grand Jury indicted the defendant on four counts: (1) possession with intent to sell over 0.5 grams of cocaine; (2) possession with intent to deliver over 0.5 grams of cocaine; (3) possession with intent to sell dihydrocodeinone; and (4) possession with intent to deliver dihydrocodeinone. The following evidence was presented at trial on August 15, 2008.

State's Proof. Detective Randy Roland, of the Putnam County Sheriff's Department, testified that he verified that the defendant lived at 22 West Stevens Street and surveilled the residence off and on for four days. During that time, the defendant was at the residence most of the time. Occasionally, the defendant would leave to drive to a parking lot where he would meet with people, make an exchange, and then return to the house. Detective Roland observed between fifty and sixty people entering 22 West Stevens Street. The defendant would open the door for each person, and the majority of those people stayed inside for three to five minutes and then exited. On one occasion, Detective Roland saw a man exit 22 West Stevens Street, enter a car, and light up what Detective Roland recognized as a crack pipe as the man drove away. He further testified that cocaine base is often packaged in plastic baggies and sells for approximately $100 per gram in Putnam County. He said that he makes the decision whether to charge someone with simple possession or with a felony drug charge based on the amount of drugs, the behavior of the suspect, and any paraphernalia such as scales. Based on his experience as a narcotics detective, Detective Roland testified that the traffic in and out of 22 West Stevens Street indicated drug transactions.

On February 23, 2007, Detective Roland and other members of the Putnam County Sheriff's Department searched 22 West Stevens Street. Two adult females and an eleven-month-old baby were inside the residence during the search. Detective Roland testified that the front bedroom of the house contained men's clothing and shoes, "photos of the defendant, [and a] lockbox key that was in his name." In that bedroom, the sheriff's deputies found two bags of a white rock-like substance and a set of digital scales, which had a white residue on them, under the mattress. They also found $1,400 in cash inside a pair of boots, $1,300 in cash in a dresser drawer, and small bags throughout the room. In the living room, they found a wooden box containing twenty white pills. Detective Roland took possession of each item, placing them in separate bags and labeling them for identification. He locked the items in an evidence locker in his office, to which he had the only key. He gave the white rock-like substance, the digital scales, and the pills to Deputy Jeff Cessna for transportation to the Tennessee Bureau of Investigation ("TBI") Crime Lab in Nashville.

On cross-examination, Detective Roland testified that he could not verify whether anyone besides the defendant stayed overnight at 22 West Stevens Street. He did not find any weapons in the residence. Detective Roland said that the defendant had just left the residence with Kelly Holloway when he decided to search the house. He further stated that

no one entered the house until the defendant had returned and given them permission to search the house. Detective Roland testified that they searched the entire house, and to his knowledge, no one lived in the second bedroom. Additionally, the defendant told him that the front bedroom was his. Detective Roland stated that the two adult females present during the search denied having the drugs. The defendant never denied that the drugs were his, but Detective Roland did not specifically discuss the drugs with him because Detective Roland had determined that the drugs belonged to the defendant. Detective Roland confirmed that the defendant was in the back of a police car during the search.

On redirect examination, Detective Roland testified that before the search, the defendant had been inside the residence for several hours before leaving and returned four to five minutes after leaving. He said that the defendant told him that one of the women who was inside the residence during the search was his daughter. Detective Roland had seen the defendant's daughter a few times during the surveillance but had not seen the other woman before that night. He testified that there were no indications that the daughter or the baby lived at the house. Additionally, there was no indication that Kelly Holloway or any other person lived there.

TBI Agent William Stanton, Jr. testified that he analyzed the evidence sent to him by the Putnam County Sheriff's Department in relation to this matter. He testified that the rock-like substance contained 3.8 grams of cocaine base, also known as crack cocaine. He further testified that he analyzed the pills and determined that they were dihydrocodeinone. Additionally, Agent Stanton said that he did not analyze a rock-like substance wrapped in a paper towel, but it weighed 1.8 grams.

Deputy Jeff Cessna testified that he transported evidence in this case to the TBI Crime Lab in Nashville. Deputy Brian Cook testified that he participated in the search of the defendant's residence and found rolls of cash in a pair of boots located in the front bedroom closet. Deputy Tom Bumbalough testified that he found a wooden box containing white pills in the living room of the defendant's residence and did not find a prescription bottle with the defendant's name.

Detective Shane Higgenbotham testified that he assisted Detective Roland in the surveillance of 22 West Stevens Street, beginning on February 19, 2007. Detective Higgenbotham said that he was familiar with the defendant and identified him in the courtroom. He witnessed forty to sixty people entering the residence and staying for three to five minutes. He also participated in the search of the residence. Detective Higgenbotham testified that the defendant did not deny that 22 West Stevens Street was his place of residence. On cross-examination, he said that the defendant was with Ms. Holloway on the night that they searched his house. Detective Higgenbotham was familiar with Ms. Holloway

because of her drug-related history with law enforcement. He did not see any women's clothing or purses in the residence.

Donna Dennis testified that as the Customer Service Manager for the City of Cookeville, she had access to the records of everyone who had applied for utility services. She said that the application for service for 22 West Stevens Street was signed by the defendant in December 2006. Ms. Dennis further said that the defendant provided a lease agreement as proof of residence that listed him as the lessee of 22 West Stevens Street.

Defense Proof. Officer Ryan Acuff, of the Cookeville Police Department, testified that he responded to a reported burglary at the defendant's residence, 22 West Stevens Street, in January 2007. When he went inside the house, he went to the back bedroom, which he understood to be the defendant's bedroom. On cross-examination, Officer Acuff identified the defendant as the person present at 22 West Stevens Street when he responded to the call.

Officer Robert Cantwell testified that he was dispatched to the defendant's residence for a vandalism complaint in February 2007. The defendant showed him where someone had kicked in the window of his front door when he would not let that person inside. Officer Cantwell advised the defendant that he could get a criminal summons for vandalism if he so chose. On cross-examination, Officer Cantwell testified that he responded to 22 West Stevens Street. The defendant was the only person present at the residence. To Officer Cantwell's knowledge, no charges were made against anyone in connection to the vandalism.

The defense recalled Detective Randy Roland. Detective Roland testified that he had previously worked as an undercover police officer and made drug buys. He also said that the police often used confidential informants to make drug buys. Detective Roland said that he did not have time to find an appropriate person to use as a confidential informant in this case because the defendant's residence was directly across from a daycare, and he did not want to leave the children in danger.

The jury convicted the defendant of possession with intent to sell over 0.5 grams of cocaine and the lesser-included offense of simple possession of dihydrocodeinone. The trial court found that the defendant was a multiple offender and sentenced him to seventeen years in the Tennessee Department of Correction for the first count, to be served consecutively to eleven months, twenty-nine days in the county jail for the second count, both sentences to be served consecutively to a nine year sentence the defendant was already serving.

Analysis

1. Sufficiency of the Evidence

The defendant contends that the evidence presented at trial was insufficient to sustain his convictions. Specifically, the defendant argues that the state failed to prove by direct evidence that the defendant sold drugs to anyone and that the circumstantial evidence was insufficient to prove that the defendant possessed the drugs.

Upon review, we reiterate the well-established rule that once a jury finds a defendant guilty, his or her presumption of innocence is removed and replaced with a presumption of guilt. *State v. Evans,* 838 S.W.2d 185, 191 (Tenn. 1992). Therefore, on appeal, the convicted defendant has the burden of demonstrating to the appellate court why the evidence will not support the jury's verdict. *State v. Carruthers,* 35 S.W.3d 516, 557-58 (Tenn. 2000); *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). To meet this burden, the defendant must establish that no "rational trier of fact" could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307, 319 (1979); *State v. Evans,* 108 S.W.3d 231, 236 (Tenn. 2003); *see* Tenn. R. App. P. 13(e). In contrast, the jury's verdict, approved by the trial judge, accredits the state's witnesses and resolves all conflicts in favor of the state. *State v. Harris,* 839 S.W.2d 54, 75 (Tenn. 1992). The state is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn from that evidence. *Carruthers,* 35 S.W.3d at 558. Questions concerning the credibility of the witnesses, conflicts in trial testimony, the weight and value to be given the evidence, and all factual issues raised by the evidence are resolved by the trier of fact and not this court. *State v. Bland,* 958 S.W.2d 651, 659 (Tenn. 1997). We do not attempt to re-weigh or re-evaluate the evidence. *State v. Rice,* 184 S.W.3d 646, 662 (Tenn. 2006). Likewise, we do not replace the jury's inferences drawn from the circumstantial evidence with our own inferences. *State v. Reid,* 91 S.W.3d 247, 277 (Tenn. 2002).

A defendant may be convicted on the basis of direct or circumstantial evidence or a combination of both. *State v. Winters,* 137 S.W.3d 641, 654 (Tenn. Crim. App. 2003); *see also State v. Pendergrass,* 13 S.W.3d 389, 392-93 (Tenn. Crim. App. 1999). In fact, circumstantial evidence alone may be sufficient to support a conviction. *State v. Tharpe,* 726 S.W.2d 896, 899-900 (Tenn. 1987). However, the circumstantial evidence "must be so strong and cogent as to exclude every other reasonable hypothesis save the guilt of the defendant, and that beyond a reasonable doubt." *State v. Crawford,* 470 S.W.2d 610, 612 (Tenn. 1971). "A web of guilt must be woven around the defendant from which he cannot escape and from which facts and circumstances the jury could draw no other reasonable inference save the guilt of the defendant beyond a reasonable doubt." *Id.* at 613.

"'[P]ossession' may be either actual or constructive" and may be proven by circumstantial evidence. *State v. Shaw,* 37 S.W.3d 900, 903 (Tenn. 2001) (citing *State v. Patterson,* 966 S.W .2d 435, 444-45 (Tenn. Crim. App. 1997); *State v. Brown,* 915 S.W.2d 3, 7 (Tenn. Crim. App. 1995)). *See also State v. Bigsby,* 40 S.W.3d 87, 90 (Tenn. Crim. App.

2000). Constructive possession requires proof that a person had the power and intention at a given time to exercise dominion and control over the drugs either directly or through others. *Shaw,* 37 S.W.3d at 903 (citing *State v. Patterson,* 966 S.W.2d 435, 444 (Tenn. Crim. App. 1997)). In essence, "constructive possession is the ability to reduce an object to actual possession." *State v. Ross,* 49 S.W.3d 833, 845-46 (Tenn. 2001) (citations omitted). However, the mere presence in an area where drugs are discovered, or the mere association with a person who is in possession of drugs, is not, alone, sufficient to support a finding of constructive possession. *Shaw,* 37 S.W.3d at 903 (citing *Patterson,* 966 S.W.2d at 445).

The intention to sell or deliver drugs may be inferred from the amount of the drug possessed by the accused along with other relevant facts surrounding the arrest. *See* Tenn. Code Ann. § 39-17-419; *see also State v. John Fitzgerald Belew,* W2004-01456-CCA-R3-CD, 2005 WL 885106, at *5 (Tenn. Crim. App., at Jackson, Apr. 18, 2005) (noting that the jury can infer intent to sell or deliver when amount of controlled substance and other relevant facts surrounding arrest are considered together). The amount the drugs and the manner in which it was packaged may also support an inference of intent to sell. *See State v. Brown,* 915 S.W.2d 3, 8 (Tenn. Crim. App. 1995).

Taken in the light most favorable to the state, we conclude that the evidence was sufficient to establish the defendant's guilt, beyond a reasonable doubt. The evidence showed that the defendant was the sole resident of 22 West Stevens Street. Detective Roland testified that he observed fifty to sixty people visiting the defendant's residence over the course of four days, each staying between three and five minutes and each greeted at the door by the defendant. Detective Roland stated that, in his experience, such behavior was indicative of drug transactions. When Detective Roland and other members of the Putnam County Sheriff's Department searched the house, the defendant had just left the house after having been inside for several hours and had only been gone a few minutes. Detective Roland found 3.8 grams of cocaine base, a set of scales, plastic baggies, and $2,700 cash in the front bedroom. There were pictures of the defendant, men's clothing, and a lockbox key in the defendant's name found in the front bedroom. The defendant also stated to the deputies that it was his room. The evidence further showed that twenty dihydrocodeinone pills were found in the defendant's living room, but there was no prescription bottle associated with the pills. Also, the women present during the search denied that the drugs were theirs. In our view, the jury could have reasonably inferred that the defendant had dominion and control over the items found in his bedroom and in the living room. Therefore, the evidence was sufficient to establish that the defendant was in constructive possession of the items. Accordingly, the evidence was sufficient to show that the defendant was in possession of 3.8 grams of cocaine base, twenty dihydrocodeinone pills, and digital scales.

The evidence was also sufficient to show that the defendant had the intent to sell unlawful substances. The testimony of Detective Roland supports that cocaine is often packaged in plastic bags, like those found in the defendant's room, when it is sold. Furthermore, the amount of cocaine found along with the digital scales and the cash support the inference that the drugs were intended for resale. In the past, we have affirmed convictions where testimony or evidence allowed the jury to draw a permissible inference from the facts surrounding the arrest of a defendant that the defendant had intent to sell or deliver drugs in his possession. *See Reid,* 91 S.W.3d at 277; *State v. Jerion Craft,* No. W2008-00869-CCA-R3-CD, 2009 WL 2634635, at *3 (Tenn. Crim. App., at Jackson, Aug. 27, 2009) (citing *State v. Chearis,* 995 S.W.2d 641, 645 (Tenn. Crim. App. 1999)). We conclude that based upon the evidence presented at trial a reasonable jury could have found the defendant guilty of the offenses charged. Therefore, the defendant is without relief on this issue.

2. Motion to Compel Disclosure of Confidential Informant

The defendant asserts that the trial court erred by refusing to order the state to disclose the identity of a confidential informant. Specifically, the defendant contends that the disclosure was material to his defense. The state responds that the trial court found that there was no confidential informant based on Detective Roland's testimony during a motion hearing and during trial and that the trial court did not abuse its discretion.

We review the trial court's decision about whether to compel disclosure of a confidential informant for an abuse of discretion. *See State v. Ostein*, 293 S.W.3d 519, 526 (Tenn. 2009). The state is generally not required to disclose the identity of confidential informants except when the informant (1) participated in the crime, (2) witnessed the crime, or (3) "has knowledge which is favorable to the defendant." *Id.* (citing *State v. Vanderford*, 980 S.W.2d 290, 397 (Tenn. Crim. App. 1997)). The trial court's decision is dependent on the peculiar circumstances of each case. *See Vanderford*, 980 S.W.2d at 396. The defendant must show by a preponderance of the evidence the circumstances that entitle him to the confidential informant's identity. *Ostein*, 293 S.W.3d at 528.

In this matter, the defendant moved the court to compel the state to disclose the identity of any confidential informant, but the state averred that there was no confidential informant. Detective Roland testified at a motion hearing that an individual confirmed that the defendant lived at 22 West Stevens Street, but the person provided no information regarding drug-related activities and was not paid. The trial court concluded, based on the state's averment and Officer Roland's testimony, that it could not compel the state to produce something that did not exist, which in this case was the identity of a confidential informant. Nothing in the testimony at trial nor the remainder of the record suggests that there was a confidential informant, the identity of whom the state might have revealed. The defendant

has not shown that the trial court abused its discretion and is not entitled to relief on this issue.

3. Warrantless Search

The defendant contends that the trial court erred in denying his motion to suppress evidence seized in a search of his home. Specifically, he argues that the search was unreasonable despite his parolee status because he was "incarcerated" at the time of the search. The state responds that the defendant had consented to the search as a condition of his parole. Furthermore, the state avers that the defendant expressly consented to the search of his home while at the scene.

The Fourth Amendment to the United States Constitution grants the right to be secure from unreasonable searches and seizures and prohibits the issuance of warrants without probable cause. Article I, section 7 of the Tennessee Constitution is identical in purpose and intent with the Fourth Amendment. *State v. Troxell*, 78 S.W.3d 866, 870 (Tenn. 2002). Under both constitutions, a warrantless search or seizure is presumed to be unreasonable, and the resulting evidence is subject to suppression unless the state demonstrates the search or seizure was conducted pursuant to one of the narrowly defined exceptions to the warrant requirement. *State v. Binette*, 33 S.W.3d 215, 218 (Tenn. 2000).

The Tennessee Supreme Court recently held that the state constitution permitted the warrantless search of a parolee who had consented to such searches as a condition of parole. *State v. Turner*, 297 S.W.3d 155, 166 (Tenn. 2009). The court adopted the analysis of the United States Supreme Court in *Samson v. California*, 547 U.S. 843 (2006), which held that a warrantless search of a California parolee without any individualized suspicion did not violate the Fourth Amendment of the United States Constitution because the state's interest in reducing recidivism was greater than a parolee's reduced privacy interest. *Turner*, 297 S.W. at 163-64. The Tennessee Supreme Court likewise reasoned that a parolee has a diminished privacy interest because parolees remain in the legal custody of the prison warden and are bound to the conditions of their release. *Id.* 162-63 (citing Tenn. Code Ann. 40-28-117(a); *Doyle v. Hampton*, 340 S.W.2d, 891, 893(1960)). The court further noted that in light of "worrisome recidivism statistics" the "[close] and careful supervision of Tennessee parolees is appropriate." *Id.* at 165. Balancing the state's interest against the parolee's interest, the Tennessee Supreme Court concluded that Article 1, section 7 of the Tennessee Constitution permits the warrantless search of a parolee when the parolee has consented to such searches as a condition of release, even when there is no reasonable suspicion that the parolee has committed a crime. *Id.* at 166. The court recognized, however, that the California statute at issue in *Samson* prescribed limits on warrantless searches of parolees by prohibiting arbitrary searches. *Id.* In contrast, Tennessee's system does not have such a prohibition, so the Tennessee Supreme Court ruled that the reasonableness of a warrantless

search of a parolee, when there is no suspicion of wrongdoing, must be examined by the totality of the circumstances. *Id.* at 167. The court opined that "[a] suspicionless search of a parolee subject to a warrantless search condition, and which is conducted out of valid law enforcement concerns, is not unreasonable." *Id.*

In analyzing the circumstances in this matter, we are bound by the trial court's findings of fact made in the suppression hearing, unless the evidence preponderates against them. *State v. Odom*, 928 S.W.2d 18, 23 (Tenn. 1996). If the issue involves an application of law to undisputed facts, we will conduct a *de novo* review as to the question of law. *State v. Troxell*, 78 S.W.3d 866, 870 (Tenn. 2002).

At the suppression hearing, Detective Roland testified that prior to searching the defendant's home, he verified that the defendant lived at 22 West Stevens Street, obtained a copy of the defendant's parole certificate that included a consent to warrantless searches, and surveilled the residence for four days, during which time he observed behavior consistent with drug activity. On the day of the search, he waited for the defendant to leave the house in a vehicle. Another deputy stopped the vehicle within two blocks of the residence and brought the defendant back to the house a few minutes later. Detective Higgenbotham read to the defendant his parole certificate, including the provision in which the defendant agreed to warrantless searches of his residence. The detectives asked the defendant's permission to search his home, which the defendant granted. Detective Roland testified that the defendant was under arrest and in handcuffs during the search as a result of the earlier traffic stop.[1] The trial court found that the defendant was a parolee subject to warrantless searches, that he was in control of the property at 22 West Stevens Street, and that the deputies had a reasonable suspicion to believe that the defendant was trafficking in drugs from that location. Under *Turner*, which was decided over a year and a half after the suppression hearing, the deputies did not need reasonable suspicion to search the defendant's house, but the fact that they did have reasonable suspicion supports the proposition that they conducted the search in furtherance of a valid law enforcement objective. The defendant argues that his detention rendered the search unreasonable, but the Tennessee Supreme Court ruled in *Turner* that a two hour detention did not render that search unreasonable. Therefore, we conclude that the defendant's detention of mere minutes did not cause the search of his residence to become unreasonable. Because the deputies searched the home of a parolee who consented to warrantless searches as a condition of parole in furtherance of law enforcement objectives,

[1] Detective Roland did not have personal knowledge of what occurred when the deputy stopped the vehicle. Because the state did not present a witness to testify as to what happened and what led to the defendant's arrest at that point, the trial court excluded evidence that the deputy seized at that time. The state has not appealed the trial court's ruling.

we conclude that the search was reasonable. The defendant is not entitled to relief on this matter.

4. Ineffective Assistance of Counsel

The defendant contends that he received ineffective assistance of counsel at trial. Specifically, he argues that his counsel should have objected to the forensic scientist's testimony about evidence that had previously been excluded. The state responds that the defendant waived the argument by not including it in his motion for new trial. However, the same counsel who represented the defendant at trial continued his representation through the motion for new trial,[2] and it would have been impractical for the defendant to include the argument in that motion. This court has previously warned that "the practice of raising ineffective assistance of counsel claims on direct appeal is 'fraught with peril' since it 'is virtually impossible to demonstrate prejudice as required' without an evidentiary hearing." *State v. Blackmon,* 78 S.W.3d 322, 328 (Tenn. Crim. App. 2001) (citations omitted). The trial court did not have an opportunity to make findings of fact because the defendant did not include the claim in his motion for new trial. We therefore decline to consider the claim on direct appeal. *See State v. Jim Gerhardt*, No. W2006-02589-CCA-R3-CD, 2009 WL 160930, at *19 (Tenn. Crim. App. at Jackson, Jan. 23, 2009); *State v. Michael J. McCann,* No. M2000-2990-CCA-R3-CD, 2001 WL 1246383, at *13 (Tenn. Crim. App., at Nashville, Oct. 17, 2001).

Conclusion

Based on the foregoing, we affirm the judgments of the trial court.

_____

J.C. McLIN, JUDGE

[2] In fact, trial counsel is still representing the defendant on appeal, so he is essentially arguing that he himself provided ineffective assistance at trial.